Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

LAURA BLUEFORD SKIPPER, Individually and As Temporary Administratrix of the Estate of ROYLETTA L. BLUEFORD, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN FINDING THAT THE ACTIONS OF CHARLES HAYWOOD IN KILLING ROYLETTA BLUEFORD WERE NOT REASONABLY FORESEEABLE WHEN SUCH FINDING WAS BASED ON THE ERRONEOUS CONCLUSION THAT HAYWOOD WAS CONVICTED OF PREMEDITATED MURDER IN THE FIRST DEGREE?

II. DID THE COURT OF APPEALS ERR IN USING HAYWOOD'S FEDERAL CONVICTION UPON A PLEA OF GUILTY TO ESTABLISH PRECLUSION ON THE ISSUE OF PROXIMATE CAUSE IN THE SUBSEQUENT CIVIL PROCEEDING INITIATED TO DETERMINE THE RESPONDENT'S NEGLIGENCE UNDER STATE LAW?

III. DID THE COURT OF APPEALS ERR BY MISAPPLYING OR MISAPPREHENDING THE "CLEARLY ERRONEOUS" RULE IN REVIEWING THE DISTRICT COURT'S FINDINGS OF FACT REGARDING PROXIMATE CAUSE, AND FINDING THAT BLUEFORD'S INJURIES WERE UNFORESEEABLE AS A MATTER OF LAW?

IV. DID THE COURT OF APPEALS ERR BY MISAPPLYING TEXAS LAW WITH REGARD TO PROXIMATE CAUSE, SPECIFICALLY FAILING TO DISTINGUISH BETWEEN THE TEXAS DOCTRINES OF "UNFORESEEABLE, SUPERSEDING" CAUSATION AND "CONCURRING OR COOPERATING" CAUSATION?

PARTIES TO THE PROCEEDINGS

ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED ARE CONTAINED IN THE CAPTION OF THE CASE IN THIS HONORABLE COURT.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, LAURA BLUEFORD SKIPPER, Individually and as Temporary Administratrix of the Estate of ROYLETTA L. BLUEFORD, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered September 10, 1993, in which the District Court's judgment in favor of Petitioner was reversed and judgment in favor of the United States was rendered.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit is reported in 1 F.3d 349 (5th Cir. 1993). A copy of the decision is appended hereto as Appendix A. A copy of the decision of the United States District Court for the Western District of Texas is appended hereto as Appendix C; it was not reported.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on September 10, 1993. This petition is filed within ninety (90) days after a timely filed Petition for Rehearing was denied on October 18, 1993, as shown in Appendix B. Rules 13.1 and 13.4, Supreme Court Rules.

Jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred by Title 28, United States Code § 1254(1).

STATUTES AND RULES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) provides as follows:

> Subject to the provisions of chapter 171 of this title, (or) the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or

> wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Rule 803(22) of the Federal Rules of Evidence, dealing with the admission of convictions based on guilty pleas, provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (22) Judgment of Previous Conviction
>
> Evidence of a final judgment, entered after a trial or upon a plea of guilty . . . to prove any fact essential to sustain the judgment . . .

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

On July 8, 1984, while a guest at the Del Norte Non-Commissioned Officers Club ("NCO Club") at Biggs Army Air Field, Ft. Bliss, Texas, ROYLETTA BLUEFORD suffered fatal gunshot wounds at the hands of a trespasser and a non-member of the club, CHARLES W. HAYWOOD, and to whom was served a number of intoxicating beverages by club personnel. On that evening, at about 9:00 p.m., Ms. BLUEFORD accompanied her friend, Patricia Aguilar, the wife of a retired non-commissioned

officer (TR 59),[1] to the NCO Club as Aguilar's guest, to spend a quiet evening dancing (TR 67, 72). Ms. BLUEFORD had moved into the Aguilar residence a few days before to avoid a CHARLES W. HAYWOOD (TR 63-64). HAYWOOD was a student of Ms. Aguilar's at El Paso Community College. She had introduced him to Ms. BLUEFORD, a school teacher. HAYWOOD became infatuated with Ms. BLUEFORD; they had dates while she tutored him in English. Ms. BLUEFORD was not serious about him and wanted to terminate the relationship (TR 61-63). Aguilar and BLUEFORD went to the NCO Club that night because they considered it to be quiet and safe (TR 76, 72).

CHARLES HAYWOOD was a former soldier who had been discharged under circumstances less than honorable. In 1979, the Commanding General at Ft. Bliss had barred him from entering that United States Military Post (PX 2, TR 15, Dep. Emma Solis; PX 3, 3A, Dep. of Wayne Currier). At the time of this incident, HAYWOOD was considered by the military to be a trespasser on the reservation (PX 3; Haywood Dep. p. 26). Nonetheless, HAYWOOD, now a civilian cab driver, delivered a fare to Biggs Field (Ft. Bliss) and after he had seen Aguilar's automobile in the club parking area, at about 10:00 p.m., he parked his taxi and walked into the club for a few

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[1] References to the record are indicated by the letter "R" followed by the volume in Roman numerals and the page in Arabic numbers. References to the transcription of the proceedings are indicated by the letters "TR" followed by the page number. References to trial exhibits are indicated by PX for Plaintiff's Exhibits and DX for Defendants' Exhibits.

drinks. He was not the guest of any club member (Haywood Dep. p. 40-41). He had been on a two day drinking binge (TR 16-18, Haywood Dep. p. 36-40). He had a .22 caliber pistol on him when he entered the club (TR 20).

The NCO Club was and still is a private facility intended only for the use of military personnel and their guests (Talamantes Dep. p. 9). The club is not open to the general public (TR 99; Talamantes Dep. p. 9). It is commonly referred to by the United States Army as a rank designated club, with use of the club's facilities restricted to military personnel having a rank of E-5 or above and their guests (Talamantes Dep. p. 7-9, admitted with PX 4, 5, and 6, TR 39, see TR 34-39). A person desiring to be admitted into the club is required to carry an identification card (Talamantes Dep. p. 10; PX 4-Army Regulation 215-2, Sections 5-10, 5-11, 5-14). Army regulations provide that member privileges will be protected by periodic checks of authorized identification cards (PX 4-Army Regulation 215-2, § 5-14 6(2); PX 5-Ft. Bliss Installation Club System House Rules). These checks are usually carried out by Master's at Arms ("M.A.'s") who are employed to ensure the comfort and safety of authorized patrons of the club (TR 108).

Although several witnesses described the NCO Club as quiet and sedate, it did have a prior history of violence and misconduct (TR 75, 91-92, 107). Besides fist fights and an armed robbery involving a shooting, G.I.s were known to throw firecrackers on the dance floor (TR 94). Furthermore, the manager of the Officer's Club at Ft. Bliss testified that it would be unusual if the NCO Club did not have fights or other disturbances from time to time (Talamantes Dep. p. 29-33).

When HAYWOOD entered the club on the night of July 8, 1984, no one asked him for identification (Haywood Dep. p. 115). There were no M.A.'s or other personnel present checking for identification either at the door or after the patrons had entered the club, despite the fact that the nearby Sergeant Majors Academy had just graduated a class and there was a larger than normal crowd of 80 to 100 patrons that would have required additional assistance (TR 73, 95-96, 109; Haywood Dep. p. 115).

Once inside and with a pistol under his belt, HAYWOOD headed immediately for the bar and began ordering bourbon and water (Haywood Dep. p. 116, 125-126). Contrary to the opinion of the Court of Appeals, there is no dispute as to the number of drinks consumed by HAYWOOD. The night manager of the club, Sergeant Major Charles Dillard, testified that he observed HAYWOOD sitting at the bar for a period of approximately 20 to 30 minutes, ordering and drinking double bourbons (TR 103). HAYWOOD's drinking apparently caught his attention because he instructed the bartender to stop serving HAYWOOD doubles (TR 103). HAYWOOD himself testified that he could have been served as many as seven to ten drinks that night (Haywood Dep. p. 116-119). According to HAYWOOD, he had at least three drinks before talking with an acquaintance, Amanda Mitchell; three drinks during his conversation with Ms. Mitchell, and more drinks afterwards (Haywood Dep. p. 116-119). Many, if not most, of these drinks were double bourbons, possibly served in two glasses. HAYWOOD also said that he was "downing them pretty fast" (Haywood Dep. p. 117).

Mark Watts, Ph.D., testified that blood alcohol tests are the best indications of the effect of alcohol on the central nervous system; that outward manifestations are not true criteria (TR 25); that a bartender or server would know if a person is intoxicated by the amount of alcohol poured into the individual (TR 25) and that in his opinion even a heavy drinker would have impaired judgment with a blood alcohol test of .15 (TR 24; see Dep. Mark Watts, Ph.D. and PX 7, 8, 9 and 10, admitted TR 26). Significantly, the Respondent offered no contradictory evidence as to the amount of alcohol consumed by HAYWOOD or as to the effects thereof.

The manager, Dillard, was familiar with Army Regulations and the Commanding General's policy for Army Club Systems (PX 4 and 5; Talamantes Dep., *supra*; TR 97-99) that clubs are not open to the general public and periodic checks should be made as to the serving of alcoholic beverages to non-authorized persons. No such checks were made that night as to HAYWOOD (TR 100-101). Furthermore, Army regulations governing club operations at the time of this incident prohibited not only the serving of alcoholic beverages to intoxicated persons, but also the serving of more than one alcoholic drink at a time to a customer. There was also evidence that the Army had experienced problems selling alcohol to drunks, and had instituted an alcohol servers intervention program as part of its effort to deglamourize drinking (PX 4; Talamantes Dep., pp. 10-11, 19).

As he continued to drink, HAYWOOD attempted to buy drinks for Aguilar, BLUEFORD and their friends, Gordon and Ann Mahon, but they refused (TR 67). He also attempted to converse with BLUEFORD, kneeling at

her table, but was rebuffed (TR 67). After moving to a table and ordering more drinks, he removed the pistol from his belt and placed it between his legs (Haywood Dep. p. 125-126). Aside from the extraordinary number of drinks he was served, he apparently presented little evidence of intoxication to those around him (TR 68, 99, 104). In this connection, Aguilar's testimony on deposition and at trial was conflicting on one important issue. In her deposition, she testified that she watched HAYWOOD closely. At trial, she testified that she did not continuously watch HAYWOOD from the time he entered the club (TR 76).

The club was dimly lit (Haywood Dep. p. 126), and may not have afforded anyone present a good opportunity to observe HAYWOOD's demeanor. HAYWOOD also testified that he had become very adept at disguising his drinking and of functioning under the influence, although he had one accident while stationed in Germany (Haywood Dep. p. 50-51). Except for a brief encounter with Dillard coming out of the restroom and conversations with Aguilar, BLUEFORD, a woman named Amanda Mitchell and perhaps the club personnel who served him, he spoke to no one (Haywood Dep. p. 120-121). Although Dillard did not smell the odor of alcohol coming from HAYWOOD's breath during their brief encounter, Dillard testified that this was not unusual because in a lounge like the NCO Club, one smells nothing but alcohol (TR 104). When Dillard observed HAYWOOD in the fresh air outside the club after the shooting, he described him as reeking of alcohol (TR 105).

From time to time, HAYWOOD exited and re-entered the club to get a bit of air (Haywood Dep. p. 42, 53, 116).

Shortly after 11:30 p.m., BLUEFORD got up to dance with another patron (TR 69, 95). According to HAYWOOD, he had just finished a drink and had ordered another drink when, after noticing that BLUEFORD had danced with a particular gentleman more than once, he "couldn't stand her with the dude" and "just went off" (Haywood Dep. 43, 53).

Aguilar was standing near the jukebox when she saw HAYWOOD moving, in a very determined fashion, toward BLUEFORD and grab her. She heard shots and saw BLUEFORD fall (TR 70). HAYWOOD then shot himself in the abdomen (TR 70). He dragged Ms. BLUEFORD through the club, to an alcove, and then out the entrance to the sidewalk, where he shot Ms. BLUEFORD two more times (TR 70-71; Haywood Dep. p. 43-45). Ms. BLUEFORD suffered four bullet wounds and died at William Beaumont Army Hospital in the early morning hours of July 9, 1984 (PX 16 hospital record, TR 27, PX 17, autopsy TR 29).

As to the pistol, HAYWOOD had bought it the day before, telling the pawn shop vendor it was for protection for his cab (Haywood Dep. p. 58). According to his testimony, he had contemplated committing suicide (Haywood Dep. p. 38-39). He had no intention of trying to kill BLUEFORD that night (Haywood Dep. p. 56). In fact, he tried to sell the gun that same day (Haywood Dep. p. 56).

HAYWOOD voluntarily pleaded guilty to murder in the second degree before U.S. District Judge Harry Lee Hudspeth, who also presided over the subsequent civil proceedings which gave rise to this appeal, and was

sentenced to thirty (30) years in prison (PX 15 – Transcript of Guilty Plea and Sentencing). [Appendix D]

II. DISPOSITION IN THE COURTS BELOW.

LAURA BLUEFORD SKIPPER, brought this action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), in her individual capacity and as personal representative of her daughter's estate, alleging ten (10) specific negligent acts or omissions and three specific acts or omissions of negligence per se on the part of the Respondent which led to the fatal injuries suffered by her daughter. After a non-jury trial, the District Court entered judgment supported by a Memorandum Opinion and Order for the Petitioner, awarding damages to Petitioner as temporary administratrix of her daughter's estate in the amount of $153,772.10, and individually in the sum of $110,000.00, for a total award of $263,772.10, together with postjudgment interest and costs (R I, 5-10).

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and ordered that Petitioner take nothing. The Court of Appeals held that HAYWOOD's "first degree, premeditated murder" of BLUEFORD constituted an "unforeseeable, superceding cause" which extinguished any liability on the part of the NCO Club for BLUEFORD's death. The Court of Appeals concluded that the District Court was "clearly erroneous in finding that the NCO Club's personnel could have foreseen that HAYWOOD would murder BLUEFORD as a result of the alcohol he consumed at the club." For the reasons that follow, the Court of

Appeals erred in concluding that HAYWOOD was convicted of premeditated murder in the first degree and that BLUEFORD's injuries were therefore unforeseeable.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT, RECURRING QUESTION OF LAW ABOUT THE EXTENT TO WHICH THE CRIMINAL CONVICTION OF A THIRD PARTY, ENTERED UPON A PLEA OF GUILTY, MAY BE USED TO ESTABLISH PRECLUSION ON THE ISSUE OF FORESEEABILITY IN A SUBSEQUENT NEGLIGENCE ACTION.

A. The Issue of HAYWOOD's Conviction for Second Degree Murder.

In the beginning of her recent best-selling book, journalist/humorist Molly Ivins observes that "Texas is not a civilized place. Texans shoot one another a lot. They also knife, razor, and stomp one another to death with some frequency. And they fight in bars all the time." Later, in a chapter lamenting the plight of Texas women, Ivins writes:

> Texas is a more violent place than most of the rest of America, for reasons having to do with guns, machismo, frontier traditions, and the heterogeneous population. While the law theoretically applies to male and female alike, by unspoken convention, a man who offs his wife or girlfriend is seldom charged with murder one: we wind up filed under the misnomer manslaughter. Molly Ivins, *Molly Ivins Can't Say That Can She*, Random House, pp. 5; 168 (1991).

According to the twisted logic of the Fifth Circuit, if ROYLETTA BLUEFORD winds up filed under the misnomer "manslaughter," her civil claim prevails. Unfortunately, her killer gratuitously and without any participation from her family, pleads guilty to the next higher charge – murder in the second degree. (Appendix D, at D4-D5, D6, D10-D11)

In the civil proceedings that followed, the district court much to its credit does not even mention HAYWOOD's conviction. This is the same court which earlier heard the killer's plea of guilty to murder in the second degree, and was far better acquainted with the facts than the Court of Appeals. (*See*, Appendix D at D4-D6, D10-D11, D14-D18, D19-D20) But, the appellate court, struggling to support its view of this case, either distorts or completely ignores the record and egregiously fabricates out of whole cloth the fiction that HAYWOOD is guilty of yet a third, higher charge – murder in the first degree. According to the Fifth Circuit's disingenuous and fact-defying line of reasoning, if HAYWOOD is found guilty of first degree murder, or "murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . or perpetrated from a premeditated design," then his conduct is not foreseeable and the government is absolved of all civil liability. *See*, 28 U.S.C. § 1111; see *contra*, Appendix D at D4-D6.

More than simply wrong or embarrassing, the appellate court's holding is grievously in error and unjust. "Premeditation," which is the fulcrum of the lower court's decision, and "malice aforethought" are not synonymous. *Ornelas v. United States*, 236 F.2d 392, 394 (9th Cir. 1956). The intent required for HAYWOOD's second degree murder conviction is malice aforethought; it is distinguished from first degree murder by the absence of

premeditation. *United States v. Harrelson*, 766 F.2d 186, 189 (5th Cir. 1985). Malice does not require a subjective intent to kill, but may be established by evidence of conduct which is "reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that the Defendant was aware of a serious risk of death or serious bodily harm." *United States v. Shaw*, 701 F.2d 367, 392, n. 20 (5th Cir. 1983), quoting *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978). To support a conviction for second degree murder, the government merely had to prove that HAYWOOD shot BLUEFORD with "a heart that is without regard for the life and safety of others." *Id.* quoting *United States v. Hinkle*, 487 F.2d 1205, 1207 (D.C. Cir. 1983).

Herein lies the fallacy of the appellate court's judgment, because a conviction for murder in the second degree under federal criminal law is equivalent to no more than a finding of gross negligence under Texas civil law. In Texas, gross negligence is defined as an entire want of care which amounts to conscious indifference for the rights, safety and welfare of others. The term "gross negligence" is synonymous with "heedless or reckless disregard." *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1985). It may be established by showing that a reasonable person would have realized that his conduct created an extreme degree of risk to others. It is limited to cases where otherwise ordinary negligence is so gross as to indicate wantonness, recklessness, or malice. *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 572-73 (Tex. 1985); *Helms v. Universal Atlas Cement Co.*, 202 F.2d 421 (5th Cir. 1953), *cert. den'd* 74 S.Ct. 74, 346 U.S. 858, 98 L.Ed. 372 (1953).

The record in this case affirmatively shows that HAYWOOD's conduct amounted to no more than gross negligence, if that. Regardless of the grade of his criminal conviction, there is absolutely no evidence that HAYWOOD's actions were premeditated, or that by prior design, he acted with a cool mind capable of reflection that fateful night. In fact, all of the evidence is to the contrary. According to his testimony, he was motivated by sudden passion fueled by the NCO Club's negligent sale of liquor to him, and when he saw BLUEFORD dancing with the same man more than once, he "couldn't stand her with the dude" and he "just went off" (Haywood Dep. 43, 53). Mere circumstance brought he and BLUEFORD together that night; he had no intention of trying to kill her (Haywood Dep. 56). Since all of the direct evidence is to the contrary, the Court of Appeals erred in finding that HAYWOOD's actions were premeditated.

B. Issue Preclusion Arising From HAYWOOD'S Plea of Guilty.

Aside from miscasting the degree of his offence, the Court of Appeals committed its most harmful error by using HAYWOOD's guilty plea to establish issue preclusion in the subsequent civil litigation with the government. According to the Fifth Circuit, HAYWOOD's "first degree, premeditated murder" of BLUEFORD did not constitute an injury as might have been anticipated by the NCO Club from HAYWOOD's conduct. To the Court of Appeals, HAYWOOD's federal conviction for what the court wrongly believes is an act of first degree murder is evidence of singular and overwhelming importance. Never mind that the conviction was based on a mere

guilty plea. In the appellate court's flawed judgment, a finding that the killing was actually less than premeditated, perhaps even negligent, is strictly precluded by the killer's conviction.

A conviction upon a plea of guilty obviously does not rest on actual adjudication or determination of any issue. Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4474, at 759 (1981 & Supp. 1993) (Appendix D). If the Fifth Circuit's opinion is left standing, a criminal defendant like HAYWOOD forecloses adjudication of important elements of his victim's civil case against third parties by pleading guilty to whatever charge is prosecutorially thought to be warranted by the facts. In the present case, litigation as to the foreseeability element of proximate cause is deemed by the Fifth Circuit to be effectively precluded by HAYWOOD's conviction. Consequently, those aggrieved by criminal conduct are further harmed by being denied a full and fair opportunity to litigate issues necessary to a civil recovery. Private plaintiffs, like ROYLETTA BLUEFORD's mother, are not parties to a prosecution and should not be bound by it.

The Court of Appeals erred in this case by according preclusive effect to HAYWOOD's conviction. His conviction for what was erroneously believed to be murder in the first degree was entered in an evidentiary vacuum, and should not have been equated with the conduct in issue in SKIPPER's subsequent civil case. Simply stated, his conviction is not proof of anything under traditional rules, except the mere fact of its rendition. *See, Chantangco v. Abarao*, 31 S. Ct. 34, 35-36, 218 U.S. 476, 481-483, 54 L.Ed. 1116 (1910); *Moore v. U.S.*, 360 F.2d 357-358 (4th Cir. 1965), *cert. den'd.* 87 S.Ct. 704, 385 U.S. 1001, 17 L.Ed. 2d

541 (1965); *Thompson v. Galaxy Enterprises, Inc.*, 414 F.Supp. 198, 199 (S.D. New York, 1976).

However, convictions based upon guilty pleas rather than adjudication have presented sharply contrasting preclusion results within the circuits. *See*, Wright, Miller & Cooper, *supra*, § 4474, at 759. Although Rule 803(22) of the Federal Rules of Evidence provides that a conviction upon a plea of guilty is admissible "to prove any fact essential to sustain the judgment," the Notes of the Advisory Committee to Rule 803 state expressly that the rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. Therefore, the important question that remains unanswered by this rule is whether the conviction may also be used as issue preclusion. Wright, Miller & Cooper, *supra*, § 4474 at 759. Just as issue preclusion should not rest on civil judgments by consent, stipulation or default, so it should not rest on a plea of guilty. *Id.* § 4474 at 760. Petitioner would therefore join professors Charles Alan Wright, Arthur Miller and Edward Cooper and urge the Supreme Court to utilize the present case to put an end to the practice of using guilty pleas to establish issue preclusion in subsequent civil litigation. Wright, Miller & Cooper, *supra*, § 4474, at 760-61.

II. THE COURT OF APPEALS MISAPPLIED THE "CLEARLY ERRONEOUS" RULE IN RELATION TO PROXIMATE CAUSE.

The Court of Appeals misapplied the "clearly erroneous" rule in relation to the District Court's findings on proximate cause. Under both Texas and federal law, proximate cause is a question of fact. *El Chico Corp. v. Poole*,

732 S.W.2d 306, 314 (Tex. 1987); *Urbach v. United States*, 869 F.2d 829, 831 (5th Cir. 1989). In reviewing questions of fact, the Court of Appeals is bound by the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. Pro. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, 2190, 22 L.Ed. 606 (1982), citing *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

Rule 52(a) does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept the lower court's findings unless clearly erroneous. *Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982). It does not divide facts into categories that deal with "ultimate" and those that deal with "subsidiary" facts. *Id.*

The rule recognizes and rests upon the unique opportunity afforded a trial court judge to evaluate the credibility of witnesses and to weigh the evidence. *Inwood Laboratories v. Ives Laboratories, supra*, citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Because of the deference due the trial judge, a finding is deemed to be "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 84 L.Ed.2d 578 (1985) (emphasis added).

Writing for this Honorable Court, Justice Sandra Day O'Connor states firmly and unequivocally that an appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the

reviewing court " . . . might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *Inwood Laboratories v. Ives Laboratories, supra* at 857-858. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *Anderson v. City of Bessemer City, N.C., supra* at 574. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. *Id.* "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Id.* citing *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969). Determining the weight and credibility of the evidence is the special province of the trier of fact. *Inwood Laboratories v. Ives Laboratories, supra* at 857. In this case, Judge Hudspeth, as trier of fact, presided over both the criminal and civil proceedings arising from this incident, and was thus far more intimately acquainted with the evidence than the Court of Appeals. If there were two permissible views of the evidence, Judge Hudspeth's choice between them *could not be* clearly erroneous. *Id.*

How could the Court of Appeals be left with the definite and firm conviction that a mistake was made when that court utterly failed to review the entire evidence in this case? The Court of Appeals relied heavily on the fact of HAYWOOD's conviction. If the appellate court had conducted a thorough review, it would have at least ascertained the correct charge to which HAYWOOD

pleaded guilty, would it not? Moreover, the Court of Appeals erroneously gave the facts another construction, clearly finding a more sinister cast to HAYWOOD's actions in the days before BLUEFORD's death than the District Court. This particular evidence was gleaned from hearsay testimony given by Aguilar, and had nothing whatsoever to do with the NCO Club's negligence. In fact, evidence of the club's negligence is no where addressed in the Fifth Circuit's opinion. The poor quality of the lower court's review is also demonstrated by its failure to evaluate the inconsistencies between Aguilar's trial testimony and her deposition, its failure to accept the testimony of the government's own witness, Sgt. Major Dillard, regarding HAYWOOD's alcohol consumption, and its failure to include or evaluate any of the expert testimony proffered as to the effects of that consumption.

The Court also neglected to take into account evidence of prior disturbances including a shooting, and the impact of Army regulations and Texas law on the Respondent's knowledge of foreseeability of the risk involved in failing to observe those laws and regulations. For example, the appellate court failed to acknowledge that Texas law prescribes severe penalties for carrying weapons where alcoholic beverages are sold, served or consumed and that notices to this effect are required to be posted in every bar and tavern in the state, or that Texas law makes it a crime to sell alcohol to intoxicated persons, and recognizes that the unexcused violation of a penal statute constitutes negligence as a matter of law if the statute is designed to prevent an injury to that class of persons to which the injured party belongs. The appellate court also

failed to acknowledge that Army regulations prohibited the sale of more than one drink at a time, or that the Army has regulations regarding both identification and the posting of masters at arms to avoid disturbances, as well as a program to deglamourize alcohol.

Liability under these laws and regulations is for the most part premised not on the conduct of the recipient of alcoholic beverages, but on the conduct of the provider of alcoholic beverages. In fact, because of the Club's blatant disregard of these laws and regulations, the general character of BLUEFORD's injuries were readily foreseeable. Significantly, the Respondent never offered any excuse for violation of these laws and regulations, other than that HAYWOOD was not visibly intoxicated and because club employees had no actual knowledge of his violent propensities, his actions could not be foreseen.

Instead, the appellate court simply undertook to duplicate the role of the trial court and made an independent determination of proximate cause, impermissibly substituting its interpretation of the evidence for that of the District Court on the issue of foreseeability. The Fifth Circuit was simply convinced that it would have decided the case differently. No deference was paid to Judge Hudspeth's fact-finding abilities. On the contrary, his findings were derisively characterized as speculative. Accordingly, the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

III. THE COURT OF APPEALS MISAPPLIED TEXAS LAW WITH REGARD TO PROXIMATE CAUSE, FAILING TO DISTINGUISH BETWEEN "UNFORESEEABLE, SUPERSEDING" CAUSATION AND "CONCURRING AND COOPERATING" CAUSATION.

A. Haywood's Criminal Conduct Cannot Constitute an Unforeseeable and Superseding Cause as a Matter of Law.

Although it is not to decide factual issues de novo, the appellate court has gone a step further and erroneously determined that HAYWOOD's criminal conduct was an unforeseeable and superseding cause as a matter of law. In so holding, the Court of Appeals summarily ignores the doctrine of "concurring and cooperating" causation long established under Texas law to impose responsibility for the often unpredictable consequences of negligent conduct. *See, e.g. Robert R. Walker, Inc. v. Burgdorf*, 150 Tex. 603, 244 S.W.2d 506 (1952); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985); *Eimann v. Soldier of Fortune Magazine, Inc.*, 608 F.Supp. 863-867 (S.D. Tex. 1988). More alarmingly, the Court of Appeals ignores a Texas decision which is factually very similar to the case at bar and directly on point concerning the question of legal causation. *S&A Beverage Co. of Beaumont No. 2 v. DeRouen*, 753 S.W.2d 507 (Tex. App. – Beaumont 1988, writ den'd); *see also*, Note, "Negligent Failure To Refuse Service To An Already Intoxicated Patron Renders Alcoholic Beverage Licensee Liable For The Intentional Torts Of Intoxicated Patrons: *S&A Beverage Co. v. De Rouen*, 753 S.W.2d 507 (Tex. App. – Beaumont 1988, writ den'd).", 20 Texas Tech L.Rev. 1323 (1989)

In that case, Rachel DeRouen met her date one evening at Bennigan's Tavern. Just prior to leaving the bar, DeRouen went to the women's restroom where she was sexually assaulted by Bobby Earl Johnson. Johnson testified that he was intoxicated when he entered the bar and was served three to five more drinks while there.

DeRouen brought suit against S&A Beverage, owners and operators of Bennigan's Tavern, seeking recovery for personal injuries suffered as a result of the sexual assault. At trial, the jury awarded DeRouen $75,000, finding that the bar owners were negligent in failing to refuse service to the intoxicated Johnson, and that such negligence was the proximate cause of the sexual assault.

On appeal, S&A Beverage argued to no avail that imposition of liability was an improper expansion of the duty imposed in *El Chico. Corp. v. Poole,* 732 S.W.2d 306, 314 (Tex. 1987). S&A Beverage also asserted, among other points of error, that the sexual assault was a criminal act which was unforeseeable as a matter of law and thus was a superseding cause of DeRouen's injuries. In rejecting the asserted error, the court held that the sexual assault could not be an unforeseeable and superseding cause as a matter of law because the assault was dependent on the tavern's negligence in serving the assailant alcohol.

In terms of the foreseeability of injuries, there is no difference between this case and *DeRouen,* except that because of the NCO Club's status as a private bar, the facts here are more compelling. As in *DeRouen,* HAYWOOD's actions were dependent on the government's antecedent negligence in allowing him onto the premises and in serving him drinks.

The *DeRouen* case is more than persuasive authority that HAYWOOD's criminal conduct cannot constitute an "unforeseeable, superseding" cause of BLUEFORD's injuries as a matter of law. That case clearly establishes the responsibility of Texas bar owners to guard against, and be economically responsible for, the violent criminal acts of their drunken patrons. *See,* Note, *supra,* 20 Texas Tech L.Rev. at 1344.

Contrary to the judgment of the Court of Appeals, HAYWOOD was not operating from a premeditated design. Nor was he operating as an outside agency, independently of any situation created by the NCO Club's negligence. As in the *DeRouen* case, his conduct was itself a reaction to the stimulus and circumstances created by the original negligence of the NCO Club in serving him alcohol and allowing him to freely circulate. Like Benningan's Tavern, the NCO Club, if not able to anticipate this particular incident, could reasonably foresee the general character of the injuries sustained.

B. Under Texas Law, the NCO Club's Negligence Was a Concurring and Cooperating Cause of BLUEFORD's Injuries.

The Fifth Circuit completely ignores relevant Texas law which recognizes that the NCO Club's negligence was a concurring and cooperating cause of injury along with the actions of HAYWOOD. Instead, the appellate court jumps to the conclusion that HAYWOOD's actions were premeditated, and therefore an unforeseeable, superseding cause of injury.

Texas cases have classified intervening causes into two basic categories: (1) "superseding causes" or "new and independent causes" and (2) "concurring causes." If an unforeseeable intervening force or act makes the alleged negligence of the defendant irrelevant, it constitutes a "superseding cause" or "new and independent intervening cause" that relieves the defendant of liability for the injury. On the other hand, an intervening cause of a plaintiff's injury, even if unforeseeable, becomes a concurrent cause of the event or injury if the chain of causation flowing from the defendant's original negligence is continuous and unbroken. In such cases, the defendant is not relieved of liability. *See, Robert R. Walker, Inc. v. Burgdorf,* 150 Tex. 603, 244 S.W.2d 506, 507 (1952). Criminal and intentionally tortious acts of third parties may be either a superseding or concurring cause. *McAfee v. Travis Gas Corporation,* 137 Tex. 314, 153 S.W.2d 442, 447-448 (1941).

As acknowledged by the Fifth Circuit, Texas courts utilize the six criteria found in § 442 of the Second Restatement of the Law of Torts in characterizing an act as a superseding cause. The courts usually consider, either explicitly or tacitly, a combination of the Restatement criteria in reviewing superseding cause issues. However, if an intervening, outside agency or force cooperates with or aids the defendant's original act or omission, Texas courts describe that agency as a "concurring cause" that does not break the chain of causation and does not relieve the original wrongdoer from liability. A *concurring cause* is one that "cooperates with the still persisting original act in bringing about the injury. When the new cause or agency concurs with the continuing and

cooperating original negligence in creating the injury, the original negligence remains a proximate cause of the injury." *Gulf, C. & S.F. Ry. Co. v. Ballew*, 66 S.W.2d 659, 661 (Comm. App. 1933, holding approved).

The Texas Supreme Court has consistently held that the intervention of a concurring cause, *even if unexpected and unforeseen*, does not relieve a wrongdoer from the consequences of the original negligence. *Clark v. Waggoner*, 452 S.W.2d 437, 439-440 (Tex. 1970); *Atchison v. Texas & P. Ry. Co.*, 143 Tex. 466, 186 S.W.2d 228, 231-232 (1945); *McAfee v. Travis Gas Corp., supra*, 153 S.W.2d 442, 447-448 (1941). The Texas rule of concurring cause finds expression in §§ 439, 448 and 449 of the Second Restatement of the Law of Torts. However, the Restatement speaks about the effects of the actor's negligence "actively and continuously" operating to bring about harm to another, even though another force intervenes and operates "actively and substantially simultaneously" in bringing about the harm.

If HAYWOOD had simply walked into the club and started firing, this would be a different case. Instead, his impulsive act of killing BLUEFORD was set in motion by the original wrongful acts of the NCO Club in allowing him onto the premises for a period of an hour and a half to two hours, and in serving him excessive amounts of alcohol. The NCO Club's negligence, continuous and unbroken, directly created the conditions which led to BLUEFORD's demise. The harmful tendency of serving too much alcohol to anyone is all too foreseeable in this day and age, whether the actual instrument of harm is a knife, razor, automobile, gun or some other device. If the automobile/gun distinction is relevant at all, it goes to

the fact question of foreseeability of BLUEFORD's injuries. *See, Marusa v. District of Columbia,* 484 F.2d 828, 835 (D.C. Cir. 1973).

Inexplicably ignoring *DeRouen,* the Fifth Circuit concluded that "the district court was clearly erroneous in finding that the NCO Club's personnel could have foreseen that Haywood would murder Blueford as a result of the alcohol he consumed at the club." In this case, foreseeability is inferred not only from alcohol consumption, but also from the fact that HAYWOOD was a trespasser and the club had a prior history of disturbances. It is also inferred from the nature of the NCO Club's business, the potential for violence which is inherent in drinking establishments, and the laws and regulations designed to curb intoxication and disturbances in effect at the time. Any reasonably prudent operator of a private club realizes or should realize that if unidentified strangers, with or without guns, are freely allowed to enter their club with little or no security, to remain there for several hours without being questioned and to drink excessively, exiting and reentering without suspicion on a number of occasions, an ideal situation is created which affords such persons an opportunity to make trouble, exposing third parties' like Blueford to unreasonable risk of harm. Had the NCO Club not provided a dimly lit, frontier-like, anything-goes atmosphere, it is highly unlikely that BLUEFORD would have been killed that evening.

As the Court of Appeals so readily observes, HAYWOOD had encountered BLUEFORD several times in the days and weeks leading up to this incident. But the court ignores the fact that none of these previous encounters

produced fatal results, until HAYWOOD entered the supposedly private NCO Club and while there was served large quantities of alcohol. To determine that the NCO Club's negligence is not concurring ignores the actual causation empirically at work in this case. The club's negligence in serving him liquor and in allowing him to freely circulate fueled HAYWOOD's impulses, and was a concurring cause of BLUEFORD's injuries for which the Respondent is liable under Texas law.

There is ample evidence to support a finding that the NCO Club was negligent in permitting HAYWOOD onto the premises and in serving him drinks, and that such negligence continuously operated without interruption until it contributed to bringing about BLUEFORD's injuries. Therefore, the District Court's findings are not clearly erroneous and its judgment should be affirmed.

CONCLUSION AND PRAYER

Because the Court of Appeals erroneously elevated the charges against HAYWOOD to murder in the first degree and accepted his conviction as substantive evidence of his conduct, and because the court misapplied both the "clearly erroneous" rule as well as Texas law on proximate cause, certiorari should be granted so that justice may be done.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

Laura Blueford SKIPPER, Individually and as Temporary Administratrix of the Estate of Royletta L. Blueford, Deceased, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 92-8231.

United States Court of Appeals,

Fifth Circuit.

Sept. 10, 1993.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, KING, and GARWOOD, Circuit Judges.

KING, Circuit Judge:

Royletta Blueford was shot and killed at the Non-Commissioned Officers Club at Biggs Army Airfield, Fort Bliss, Texas on July 8, 1984, by Charles Haywood, a former boyfriend. Blueford's mother, Laura Blueford Skipper, brought this action against the United States, alleging that the officer's club negligently served alcoholic beverages to Haywood when he was intoxicated and that this negligence was a proximate cause of Blueford's death. The district court entered a judgment in favor of Skipper, and the United States appeals from that judgment. Finding that Haywood's actions were not foreseeable by the club, we reverse and render judgment in favor of the United States.

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I

A

Blueford was introduced to Haywood in December 1983. They dated for several months and established an intimate relationship; in fact, Haywood proposed marriage. Blueford rejected Haywood's proposal of marriage, however, and sought to end their relationship. In June and July of 1984, Hayward began to harass Blueford. First, he telephoned Blueford and wrote her notes; he then followed her, monitoring her movements, and attempted to break into Blueford's apartment; ultimately, Hayward threatened physical violence, which included a threat to kill Blueford if she did not sleep with him. This pattern of harassment escalated to physical violence when, on July 4, 1984, Haywood forced his way into Blueford's apartment and raped her.

Although she did not report the rape, Blueford filed a formal complaint with the El Paso Police Department on July 6, 1984, stating that she was willing to prosecute Haywood for threatening her. Blueford specifically reported that Haywood threatened to "blow her away" if she did not sleep with him.[1] According to Patricia Aguilar, a close friend of Blueford, Blueford was terrified of Haywood during the first week of July. In fact, she considered moving away from El Paso, Texas but, instead, accepted an offer to stay at Aguilar's home. Even when she was staying at Aguilar's home, Haywood continued

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[1] Haywood later admitted that he threatened to kill Blueford.

to harass Blueford. However, according to Aguilar, Aguilar's large German shepherd dog "encouraged" Haywood to leave.

Aguilar is the wife of a retired, non-commissioned officer, a status which entitles her to access the Non-Commissioned Officers Club (NCO Club) at Biggs Army Airfield, Fort Bliss, Texas. The NCO Club is located near the Sergeant Majors Academy, "Sergeant Major" being the highest rank attainable by a non-commissioned officer in the military. On Sunday, July 8, 1984, Blueford and Aguilar decided to go to the NCO Club; because the club is not open to the general public and is situated on a federal enclave surrounded by soldiers, they felt that Haywood would not attempt an altercation there. Moreover, prior to Blueford's murder, the NCO Club enjoyed a reputation as being a relatively quiet club. In fact, at trial, Sergeant Major Dillard testified that he had worked as the night manager at the NCO Club during the eighteen months prior to July 8, 1984 and that, during that time, he witnessed only one incident – a shoving match – involving any violence, and it did not involve a weapon. According to Dillard, that incident was broken up quickly and without the need for calling the military police.

Haywood was a cab driver. On the evening of Sunday, July 8, at approximately 10 p.m., Haywood delivered a fare to the NCO Club and recognized Aguilar's car in the parking area. Although the NCO Club is not open to the general public and Haywood was not the guest of any club member, Haywood entered the NCO Club; no one asked him for identification. Haywood carried a gun, purchased the day before, which he concealed beneath his shirt. Upon entering the NCO Club, Haywood went to

the bar and had a few drinks. He then moved to a table. On several occasions, Haywood got up from his table, walked directly past – and within a foot of – Aguilar's and Blueford's table, left the NCO Club, re-entered, and then passed Aguilar and Blueford again. According to Aguilar, Haywood did this a [sic] least three or four times during a two-hour period. At least once during the evening, Haywood approached Blueford to speak with her, but she ignored him and Aguilar told him to leave their table. Aguilar then approached Haywood at his table and told him to forget about his relationship with Blueford and to leave the NCO Club. Haywood refused.

Haywood consumed drinks while sitting at the bar and while sitting at his table, and he was served by at least three separate individuals – two bartenders and a waitress. He paid for his drinks in cash, thereby avoiding any tabulation of his overall alcohol consumption at the club. Haywood had been drinking alcohol prior to his arrival at the NCO Club and, while at the club, he consumed between seven and ten drinks containing alcohol.[2] Aguilar testified that she watched Haywood closely during the course of the evening because she learned the night before that he had raped Blueford just a few days earlier. According to Aguilar, Haywood showed no effects of drinking alcohol; specifically, she stated that he did not slur his speech, raise his voice, swagger when

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[2] The parties dispute the number of drinks consumed by Haywood at the NCO Club, Skipper asserting that several of Haywood's drinks were doubles. According to the record, these "doubles" were, in accordance with the NCO Club's policy, two separate drinks served at once rather than a single, double-strength drink.

walking, or demonstrate any other indication that he was intoxicated. In fact, during the course of the evening, Haywood walked around the club, exited and re-entered, and had several conversations with an acquaintance, Amanda Mitchell. Aguilar also testified that there was no indication that Haywood was carrying a revolver. Aguilar's testimony was corroborated by that of Dillard, who accidentally bumped into Haywood in a crowded corridor just a few minutes before the shooting. According to Dillard, Haywood did not appear to be intoxicated and he seemed very civil. At no time did Aguilar or Blueford inform the NCO Club personnel that Haywood posed a threat or that they desired that he leave the club.[3] In fact, Aguilar testified that Haywood acted like a "perfect gentleman" throughout the evening. Haywood also testified that he had been a chronic but functional alcoholic since the age of nineteen; specifically, he testified that, despite the fact that he averaged a "fifth" of hard alcohol per day, he was able to function in the Army and as a taxi cab driver.

Blueford danced with several patrons during the course of the evening and, shortly before midnight, she got up to dance with another. While she was dancing, Haywood approached her, pulled out his revolver, grabbed her, twisted her towards him, and fired two shots into her chest at point-blank range. Haywood testified that he also shot at but missed Blueford's dancing partner. Haywood then picked Blueford up and, while

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[3] Haywood testified that he would have left the NCO Club if he had been asked by the club's personnel to do so.

doing this, pointed the gun at his own head and occasionally brandished the weapon; Haywood later testified that it was his intention to commit suicide or shoot any person who tried to stop him. Aguilar attempted to convince Haywood to release Blueford, but she backed away when Haywood told her that she "was next." After dragging Blueford out of the NCO Club, Haywood shot her two more times. He also shot himself once in the abdomen in an effort to commit suicide.

Blueford was rushed to the hospital, where she died early on the morning of July 9. Haywood, whose blood alcohol level was determined to be .15, did not suffer permanent injury to any internal organs from his self-inflicted gunshot wound. Prior to his discharge from the hospital, Haywood attempted suicide on two more occasions; one of these attempts involved an overdose of prescribed medications which left him in a coma for several days.

Haywood was found guilty of killing Blueford in the first degree pursuant to 18 U.S.C. § 1111,[4] and was sentenced to a thirty-year term of imprisonment for the

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[4] Section 1111, provides that

> [m]urder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . ; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

crime. And it was revealed during these criminal proceedings that Haywood has a lengthy record of violent behavior, which is documented through his arrest history.

B

Skipper, individually and in her representative capacity as temporary administratrix of her daughter's estate, brought this action against the United States after her administrative claim against the United States Army was denied on March 1, 1988. The United States answered and filed a motion for summary judgment, which the district court granted in part and denied in part. Specifically, the court granted the United States summary judgment on Skipper's claims that the United States was negligent in allowing Haywood to enter the NCO Club and in allowing him to enter the club with a firearm. The court denied the United States's motion for summary judgment on Skipper's two other theories of recovery: (1) that the employees of the NCO Club were negligent in serving alcohol to Haywood when he was intoxicated; and (2) that the NCO Club personnel were negligent in failing to promptly respond after Haywood first shot Blueford.

Following a bench trial, the district court entered a judgment in favor of Skipper in March 1992, awarding her damages in her capacity as administratrix in the amount of $153,772.10. The court also awarded Skipper $110,000.00 in damages in her individual capacity. In its memorandum containing findings of fact and conclusions of law, the court held that the NCO Club personnel should have known that Haywood was intoxicated based

upon the number of drinks he consumed during the time he was in the club. The court also found that Haywood probably would not have shot Blueford had he not been severely intoxicated. The United States now appeals from the district court's judgment in favor of Skipper.

II

Skipper has brought this claim against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674. Under the FTCA, the United States is liable in damages only if a private person would be liable for the same allegedly negligent act or omission under the laws of the state within which the act or omission occurred. 28 U.S.C. § 2674 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . . "); *see Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Accordingly, Skipper's claim is governed by Texas' law on negligence.

Under Texas law, negligence consists of four essential elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) actual injury to the plaintiff; and (4) a showing that the breach was a proximate cause of the injury. *See Urbach v. United States*, 869 F.2d 829, 831 (5th Cir.1989) (applying Texas law). Causation is a question of fact and, in a bench trial, it is reviewed under the clearly erroneous standard. *Id.* "There are two elements of proximate cause under Texas law: foreseeability and cause in fact." *Id.; see also Bykowicz v. Pulte Home Corp.*, 950 F.2d 1046, 1053-54 (5th Cir.) (applying Texas law), *cert. denied*, ___ U.S. ___, 113 S.Ct.

73, 121 L.Ed.2d 38 (1992). In applying Texas law, this court has held that "[f]oreseeability requires that the injury complained of be of such a general character as *might reasonably have been anticipated* from the defendant's conduct." *Bykowicz*, 950 F.2d at 1054 (emphasis added). Similarly, the Supreme Court of Texas has held that:

> All that is required is that the injury be of such a general character as *might reasonably have been anticipated* and that the injured party be so situated with relation to the wrongful act that injury *might reasonably have been foreseen*.

Brown v. Edwards Transfer Co., 764 S.W.2d 220, 224 (Tex.1989) (emphasis added). The Supreme Court of Texas has also stated that "[f]oreseeability does not require [that] the actor anticipate the particular accident, but only that he *reasonably anticipate the general character of the injury.*" *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex.1987) (emphasis added). Although a tortfeasor's negligence is not superseded when criminal conduct is a *foreseeable* result of that negligence, "[g]enerally, a person's criminal conduct is a superseding cause extinguishing liability of a negligent actor." *Id.* at 313-14; *Gutierrez v. Scripps-Howard*, 823 S.W.2d 696, 700 (Tex. App. – El Paso 1992, no writ).

In the case before us, the district court relied heavily upon the Texas Supreme Court's opinion in *El Chico*, 732 S.W.2d at 313. As explained in *Riojas v. Phillips Properties, Inc.*, 828 S.W.2d 18, 23 (Tex. App. – Corpus Christi 1991, no writ), before *El Chico*, Texas followed the common-law rule that a purveyor of alcoholic beverages was not liable for damages sustained by third persons resulting from a patron's intoxication. The *El Chico* court abolished this

rule of non-liability, noting that a civil cause of action exists in forty-one of fifty American jurisdictions – including the District of Columbia and excluding Texas – with a substantial majority basing the cause of action upon the common-law principles of negligence, negligence per se, or both. *Riojas*, 828 S.W.2d at 23. Moreover, the *El Chico* court addressed the "dramshop" statute enacted by the Texas legislature the week before, Tex. Alco.Bev.Code Ann. § 2.02, which created a civil cause of action against an alcoholic beverage licensee when "at the time . . . [of service] . . . it was *apparent* to the provider that the individual being . . . served . . . was obviously intoxicated to the extent he presented a clear danger to himself and others." The court stated that "[t]he legislature appears to have created a much more onerous burden of proof for an injured plaintiff than we have in this opinion. This act, however, does not by its terms govern a cause of action arising or accruing before its effective date." 732 S.W.2d at 314.

The *El Chico* court concluded that an alcoholic beverage licensee could be liable to a person injured by an intoxicated[5] driver for selling alcohol to that intoxicated

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[5] As explained in *El Chico*,

> Intoxication refers to a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical facilities and a resulting diminution of the ability to think and act with ordinary care. *Thus the duty to discontinue serving alcohol arises once, through the observation of a patron's demeanor, conduct or appearance, a licensee knows or should know the patron is intoxicated.*

732 S.W.2d at 313 (emphasis added).

driver. The rationale underlying the decision is that, "[c]learly, a patron's criminal act is a foreseeable consequence in light of our universal use of automobiles and accidents involving drunk drivers." 732 S.W.2d at 314. Applying *El Chico* to the case at issue, the district court determined that "[t]he number of drinks served to Haywood, and the speed with which he consumed them, put the Defendant's bartenders on notice that he was intoxicated." The court then speculated that, "[h]ad Haywood not become severely intoxicated, and had his judgment not been greatly impaired, it is highly improbable that he would have shot Ms. Blueford simply because he saw her dancing with a stranger." And the court concluded that "[t]he defendant's agents in the instant case could reasonably have foreseen that an injury or harm of this general nature was likely to occur, although it might have been vehicular homicide rather than a death by shooting."

In challenging the district court's findings, the government first questions the district court's retroactive application of *El Chico*. Although Haywood killed Blueford several years before *El Chico* was decided, *El Chico* has been applied retroactively under similar circumstances. *See Riojas*, 828 S.W.2d at 22-23. We find that the retroactive application of *El Chico* to the case before us is in accordance with "[t]he general rule . . . that a decision of the supreme court is retrospective in operation." *Id.* at 22, *citing Burns v. Thomas*, 786 S.W.2d 266, 267 n. 1 (Tex.1990); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex.1983).

We do not agree, however, with the district court's determination that *El Chico* supports a finding that Haywood's first-degree murder of Blueford was foreseeable.

Even if we assume arguendo that the alcohol the NCO Club served to Haywood was a cause-in-fact of Blueford's murder, we conclude that the premeditated murder of Blueford by Haywood at the NCO Club does not constitute an injury (such as the involuntary manslaughter at issue in *El Chico*) "of such a general character as might reasonably have been anticipated [by the NCO Club] from [Haywood's] conduct." *Bykowicz*, 950 F.2d at 1054. Rather, we conclude that Haywood's criminal conduct constitutes an unforseeable, superseding cause which extinguished any liability on the part of the NCO Club for Blueford's death. *See Gutierrez*, 823 S.W.2d at 700 ("Generally, a person's criminal conduct is a superseding cause extinguishing liability of a negligent actor."); *El Chico*, 732 S.W.2d at 313.[6] We conclude, therefore, that the

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[6] Section 448 of the RESTATEMENT provides:

> The act of third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS (1965 & Supp. 1992-93). Section 442 of the RESTATEMENT identifies the following considerations as being of importance in determining whether an intervening force constitutes a superseding cause of harm:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

district court was clearly erroneous in finding that the NCO Club's personnel could have foreseen that Haywood would murder Blueford as a result of the alcohol he consumed at the club. Accordingly, we reverse the district court's judgment in favor of Skipper and render judgment in favor of the United States.

III

For the foregoing reasons, we REVERSE the district court's judgment in favor of Skipper and RENDER judgment in favor of the United States.

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; [and]

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Id. at § 442.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8231

LAURA BLUEFORD SKIPPER, Individually
and as Temporary Administratrix of the
Estate of Royletta L. Blueford, Deceased,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING

(October 18, 1993)

Before REAVLEY, KING, and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Divun King
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

LAURA BLUEFORD SKIPPER, Individually and as Temporary Administratrix of the Estate of Royletta L. Blueford, Deceased, Plaintiff,	§	NO. EP-88-CA-328-H
v.	§	
UNITED STATES OF AMERICA, Defendant.	§	

MEMORANDUM OPINION AND ORDER

This is an action for wrongful death against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 **et seq.** This Court has jurisdiction under 28 U.S.C. § 1346(b). The case was tried to the Court without a jury. The Court's findings of fact and conclusions of law are incorporated in this opinion.

Royletta L. Blueford died on July 9, 1984, a murder victim. She was shot and killed by Charles W. Haywood on the premises of the Del Norte NCO Club which is located on the military reservation at Fort Bliss, Texas. At the time of her death, Ms. Blueford was 32 years old and single. Her mother, Laura Blueford Skipper, brings this action on her own behalf and on behalf of the decedent's estate. The Plaintiff alleges that the negligence of the Defendant, its agents and employees, was a proximate cause of the untimely death of Royletta L. Blueford.

The facts may be briefly summarized as follows: Royletta Blueford was a single woman who taught school at Irvin High School in the El Paso Independent School District. In December, 1983, she became acquainted with Charles W. Haywood. Ms. Blueford and Haywood dated off and on for several months. Haywood proposed marriage, but Ms. Blueford was not interested, and she ended the relationship. Haywood was obsessed with Ms. Blueford, and he was unable to accept the termination of their relationship. Ms. Blueford confided in her friend, Patricia Aguilar, that Haywood had been following her around and had attempted to break into her apartment. On July 5, 1984, Mrs. Aguilar invited Ms. Blueford to stay with her in her home for a few days. On July 7, 1984, a Saturday, Haywood came to the home of Mrs. Aguilar in search of Ms. Blueford. Mrs. Aguilar ordered him to leave, and Haywood finally did. On July 8, 1984, a Sunday, Ms. Blueford decided that she wanted to go out. Mrs. Aguilar agreed, and they decided to go to the Del Norte NCO Club for a drink. This is where they encountered Haywood, with fatal results.

Haywood was a taxi driver by profession. He reported for work on Saturday, July 7, 1984, but had difficulty concentrating because he was obsessed with his troubled relationship with Ms. Blueford. He went to Mrs. Aguilar's home in search of her, but was frustrated when his effort to see her was rebuffed. He drank some liquor from a bottle he had purchased, and went to a pawn shop to purchase a pistol. According to Haywood, he was contemplating suicide. He later reconsidered, and attempted to sell the gun. After his shift on Saturday night, he went to Juarez, Mexico, and drank some more.

The following day, July 8, 1984, Haywood was driving his taxi in the evening. He took a fare to the Del Norte NCO Club at Biggs Field, and decided to go in and have a drink. He observed that Mrs. Aguilar and Ms. Blueford were there. He attempted to send drinks to their table, but Mrs. Aguilar and Ms. Blueford declined to accept them. Haywood sat at the bar and chatted with an acquaintance, Amanda Mitchell. After she left, Haywood went and sat at a table. All this time, he had the pistol he had purchased at the pawn shop concealed under his shirt. At one point, he went to Ms. Blueford's table and attempted to talk to her, but she refused to talk to him. Throughout this period, Haywood was being served drinks by the personnel at the NCO Club. According to Haywood, he had at least three drinks before talking with Ms. Mitchell; three drinks during his conversation with Ms. Mitchell, and more drinks afterward (Haywood Deposition, pp. 18-19). Many, if not most, of these drinks were double bourbons.

Sometime between 11:30 p.m. and 12:00 midnight, Ms. Blueford got up to dance with a patron of the club. Haywood approached the couple, took out his pistol, and shot Ms. Blueford. She screamed that she had been shot and called for help. Haywood dragged Ms. Blueford outside the club and into the parking lot, where he shot her again. In all, the decedent was shot at least four times. Mrs. Aguilar went outside and confronted Haywood in the parking lot. He threatened her. In the meantime, the night manager of the NCO Club had telephoned for help. The military police arrived at approximately 12:00 midnight and took Haywood into custody. An ambulance

took Ms. Blueford to William Beaumont Army Medical Center, where she died at approximately 1:30 a.m.

The Plaintiff contends that the employees of the Del Norte NCO Club were negligent in serving drinks to Haywood after he had become intoxicated, and that such negligence was a proximate cause of the death of the decedent. Under the Federal Tort Claims Act, the United States is liable in damages only if a private person would be liable under the same or similar circumstances under the law of the state within which the allegedly negligent act or omission occurred. 28 U.S.C. § 1346(b), 2874. Since the cause of action in this case arose on the Fort Bliss Military Reservation located within the state of Texas, the law of Texas applies in determining liability. To prevail in a negligence action in Texas, a plaintiff must establish three essential elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty, and (3) damages proximately resulting from the breach. **El Chico Corporation v. Poole,** 732 S.W.2d 306, 311 (Tex. 1987). Under Texas law, an alcohol licensee has a duty not to serve alcoholic beverages to a patron who is already intoxicated. **El Chico Corporation v. Poole, supra** at 311. The duty to discontinue serving alcohol to a patron arises when the licensee knows, or under the circumstances should know, that the patron has become intoxicated. **El Chico Corporation v. Poole, supra** at 313. Not surprisingly, both Texas law (Tex.Alco.Bev.Code Ann. § 101.63(a)) and military regulations (Army Regulation 215-2) prohibit the serving of alcoholic beverages to

intoxicated patrons. The legal duty of the alcoholic beverage licensee extends to third parties who might foreseeably be injured by the acts or omissions of the intoxicated person. **El Chico Corporation v. Poole, supra.**

Once a legal duty has been established, as it has been here, the question whether the defendant breached that duty through negligence is a question of fact. **Garza v. United States,** 809 F.2d 1170 (5th Cir. 1987); **Atchison, Topeka and Santa Fe Railway Company v. Standard,** 696 S.W.2d 476 (Tex.App. – Eastland 1985, writ ref'd n.r.e.). The question in this case is whether the NCO Club personnel knew, or should have known, that they were serving alcoholic beverages to an intoxicated person.

In this case, Haywood's demeanor and conduct was not unusual enough to call attention to himself. There is no evidence that he exhibited staggering, slurred speech, and the like. However, there are other ways in which a licensee may be put on notice that a patron has become intoxicated. This case is a prime example. Within a relatively short space of time, the NCO Club's bartenders served Haywood from seven to ten drinks of bourbon and water, a number of which were "doubles". Serving doubles to a patron was contrary to club policy and contrary to Army regulations.[1] The night manager of the Del Norte NCO Club, Sergeant Major Charles Dillard, testified that he observed Haywood sitting at the bar and drinking double bourbons for a period of twenty to thirty minutes. In fact, Dillard finally reminded the bartender

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[1] Army Regulation 215-2, which governs club operations, prohibits the serving of more than one drink at a time to a patron.

that serving doubles was not allowed. When Dillard observed Haywood in the club parking lot immediately after the shooting incident, he described Haywood as reeking of alcohol. A blood sample taken from Haywood shortly afterward revealed a blood alcohol level of .15 (Plaintiff's Exhibit 10). With that level of blood alcohol concentration, Haywood would have been intoxicated and his judgment would have been severely impaired (Deposition of Mark Watts, Ph.D., pp. 13-15). The number of drinks served to Haywood, and the speed with which he consumed them, put the Defendant's bartenders on notice that he was intoxicated. The Court, therefore, finds from a preponderance of the evidence that the Defendant's agents and employees were negligent.

The next question is whether the negligence was a proximate cause of the decedent's death. In Texas, "proximate cause" has two elements: cause in fact and foreseeability. **Exxon v. Quinn,** 726 S.W.2d 17, 21 (Tex. 1987). Cause in fact simply means that the negligent act or omission was a substantial factor in bringing about the injury and without which the harm would not have occurred. **Nixon v. Mr. M Property Management Company,** 690 S.W.2d 546, 549 (Tex. 1985). Foreseeability means the actor as a person of ordinary intelligence should have anticipated the danger inherent in his negligent act. **Nixon v. Mr. M Property Management Company, supra** at 550; **Missouri Pacific Railroad v. American Statesman,** 552 S.W.2d 99, 103 (Tex. 1977). In the instant case, the Court finds that the Defendant's negligence was a cause in fact of the decedent's death. Had Haywood not become severely intoxicated, and had his judgment not been greatly impaired, it is highly

improbable that he would have shot Ms. Blueford simply because he saw her dancing with a stranger. Furthermore, the harm was foreseeable. Foreseeability does not require the negligent actor to anticipate the particular harm, but only that he reasonably anticipate the general character of the injury. **El Chico Corporation v. Poole, supra** at 313; **Nixon v. Mr. M Property Management Company, supra** at 550. The Defendant's agents in the instant case could reasonably have foreseen that an injury or harm of this general nature was likely to occur, although it might have been vehicular homicide rather than a death by shooting. Under the circumstances, a patron's criminal act was a foreseeable consequence. **El Chico Corporation v. Poole, supra** at 314. The Court finds from a preponderance of the evidence that the negligence of the Defendant's agents and employees was a proximate cause of the death of Ms. Blueford.

The remaining element is damages proximately resulting from the Defendant's breach of a legal duty. Plaintiff Laura Blueford Skipper brings this action in two capacities: in her representative capacity, as temporary administratrix of the estate of Royletta L. Blueford, and in her individual capacity as the surviving mother of the decedent. The "survivor's action", i.e. the action to recover damages for the decedent's conscious pain and suffering, if any, prior to her death inures to her heirs and estate. Tex.Civ.Prac.& Rem. Code Ann. § 71.021. In a survivor's action, the burden is on the plaintiff to establish the decedent's conscious pain and suffering by a preponderance of the evidence. **Moorhead v. Mitsubishi Aircraft International, Inc.**, 828 F.2d 278, 288 n. 43 (5th

Cir. 1987). In the instant case, there is clear and undisputed evidence that Royletta Blueford endured conscious pain and suffering before her death. She was first shot by Haywood sometime between 11:30 p.m. and midnight. After being shot, she was dragged outside and shot again in the parking lot. In all, she was shot at least four times. She was conscious during this period, and calling for help. Some twenty to thirty minutes elapsed between the time she was first shot and the time Haywood was subdued and Ms. Blueford was taken to the hospital by ambulance. She was still conscious when she arrived at William Beaumont Army Medical Center, and the exact time she lost consciousness is not clear from the record. She was pronounced dead at 1:30 a.m. Ms. Blueford was obviously conscious for at least one hour after first being wounded by Haywood, and possibly for as much as an hour and forty-five minutes or two hours. During that time, she endured great pain, suffering and mental anguish. The Court finds the reasonable value of the survivor's action to be $150,000.00.

The estate of Royletta L. Blueford is also entitled to recover in damages a reasonable sum for funeral and burial expenses. The actual expense for Ms. Blueford's funeral and burial, including a headstone, was $3,381.10, which the Court finds to be necessary and reasonable.

William Beaumont Army Medical Center also billed the Plaintiff $391.00 for the emergency care afforded the decedent on July 8 and 9, 1984. These reasonable and necessary expenses are also recoverable by the estate.

Other elements of damages for the wrongful death of Royletta L. Blueford inure to Laura Blueford Skipper

individually. These elements of damages include pecuniary loss, loss of society and companionship, and mental anguish. Pecuniary loss for the parent of an adult child is defined as the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that the parent would, in reasonable probability, have received from the deceased had she lived. **Moore v. Lillebo,** 722 S.W.2d 683, 687 (Tex. 1986). Mental anguish is defined as the emotional pain, torment, and suffering that the parent would, in reasonable probability, experience from the death of the child. Companionship and society is defined as the positive benefits flowing from the love, comfort, companionship and society the parent would, in reasonable probability, have experienced if the child had lived. **Moore v. Lillebo, supra** at 688.

At the time of her daughter's death, Laura Blueford Skipper was 70 years of age and had a reasonable life expectancy of approximately ten years. She was still working as a licensed vocational nurse, but Royletta assisted her financially. Royletta gave her mother $50.00 to $60.00 a month, paid her health insurance premium, and sometimes gave her food. When an unusual or special need arose, Royletta would further assist her mother financially. For example, a few years before her death, Royletta furnished a new roof and an air conditioner for her mother's house. She visited with her mother periodically, although apparently not on a regular basis. Mrs. Skipper testified that after her daughter's death, she was unable to continue working because of anxiety and "nervousness". Her only income now is from Social Security benefits. The Court finds that as a proximate result of her

daughter's death, Laura Blueford Skipper has suffered pecuniary loss in the amount of $10,000.00 which is compensable in the form of damages for wrongful death. Laura Blueford Skipper has also suffered loss of society and companionship and mental anguish for which she is entitled to recover damages in the amount of $100,000.00.

It is therefore ORDERED that the Plaintiff Laura Blueford Skipper as temporary administratrix of the estate of Royletta L. Blueford, deceased, do have and recover judgment of and from the Defendant, United States of America, for damages in the amount of $153,772.10, plus post judgment interest according to law, and costs of Court herein expended.

It is further ORDERED that Plaintiff Laura Blueford Skipper individually do have and recover judgment of and from the Defendant United States of America for damages in the amount of $110,00.00 [sic], plus post judgment interest according to law, and costs of Court herein expended.

SIGNED AND ENTERED this 5th day of March, 1992.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES
DISTRICT JUDGE

APPENDIX D

PLAINTIFFS EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

UNITED STATES OF AMERICA Plaintiff vs. CHARLES WILLIAM HAYWOOD Defendant	EP-84-CR-149 Transcript of Proceedings September 25, 1984

Motion to Suppress..... 2
Plea of Guilty.....4
Sentencing.....15

Appearances:

For the Plaintiff: Ricardo Gonzalez
Assistant U. S. Attorney
United States Court House
El Paso, Texas 79901

For the Defendant: Evelina Ortega
Assistant Federal Public Defender
Federal Building
El Paso, Texas 79901

Court Reporter: Ernest C. Swanson
439 U. S. Court House
El Paso, Texas 79901

* * *

October 19, 1984 commencing at 12:00 noon.

The Plea of Guilty

MR. GONZALEZ: Ricardo Gonzalez for the United States. We're ready.

MS. ORTEGA: Evelina Ortega for Mr. Haywood, Your Honor. We are ready.

THE COURT: You're Mr. Charles William Haywood?

MR. HAYWOOD: Yes, Your Honor.

THE COURT: Mr. Haywood, you can hear me all right, can't you?

MR. HAYWOOD: Yes.

* * *

[p. 5] THE COURT: What I'm saying to you. Mr. Haywood, a plea agreement has been filed in writing which states that you will plead guilty to the indictment in this case. That pursuant to Rule 11(e)(1)(c) of the Federal Rules of Criminal Procedure, the United States Attorney is going to recommend that a sentence of no more than 30 years be imposed, and this is the plea agreement.

I'll tell you in that connection, Mr. Haywood, that my interpretation of the agreement would be, and this is what I would apply in this case, that if you enter a plea of guilty and if I accept that plea, and if the presentence investigation discloses anything that would make me unable to go along with the terms of that plea agreement,

I would let you withdraw your plea of guilty. Do you understand that?

MR. HAYWOOD: Yes, sir.

THE COURT: So in a sense you can't be denied what you bargained for because if based on the presentence investigation I decided that that was not the appropriate sentence in the case, I'd let you withdraw your plea of guilty and set it for trial again and start all over again. Do you understand that?

MR. HAYWOOD: Yes, sir.

THE COURT: Mr. Haywood, before we even talk about a plea of guilty to the charge in the indictment, though, let me remind you that you have the right to have this case [p. 6] presented to a jury and have the jury determine whether or not you're guilty or not guilty of the charge.

Do you understand that?

MR. HAYWOOD: Yes, sir.

THE COURT: In fact, we have a jury panel notified to report in on Monday and to select a jury at that time to try your case. You're aware of that, aren't you?

MR. HAYWOOD: Yes, sir.

THE COURT: And so that is a right that you have to just go on through with your trial and select a jury and let the jury decide. If you choose an alternative to that, that is, if you choose to plead guilty instead, that must be a voluntary decision that you are making. Do you understand that?

MR. HAYWOOD: Yes, sir.

THE COURT: Before we proceed, I'm going to ask the Clerk to administer an oath to you now.

(The Defendant was sworn.)

THE COURT: You've taken an oath now, Mr. Haywood, to tell the truth. And all the statements you make here in Court must be truthful. Do you understand that?

MR. HAYWOOD: I understand.

THE COURT: If you made any statement that was not the truth, that statement could be used against you in a prosecution for the offense of perjury. Do you understand [p. 7] that?

MR. HAYWOOD: Yes, sir; I do.

THE COURT: Mr. Gonzalez, you may proceed.

MR. GONZALEZ: Charles William Haywood, is that your true and correct name?

MR. HAYWOOD: Yes, sir.

MR. GONZALEZ: And you're represented by your attorney, Ms. Ortega, who is standing here with you today?

MR. HAYWOOD: Yes, sir.

MR. GONZALEZ: Mr. Haywood, you have been charged by the Grand Jury in a one-count indictment which charges you as follows:

On or about the 8th day of July, 1984, at Biggs Army Air Field on Fort Bliss, Texas in the Western District of

Texas, on lands acquired for the use of the United States and under the exclusive jurisdiction thereof, the Defendant, Charles William Haywood with malice aforethought and by means of shooting Royletta Bluford, did murder Royletta Bluford in violation of Title 18, United States Code, Section 1111 and 7.

Mr. Haywood, do you understand the nature of the charge against you?

MR. HAYWOOD: Yes, sir; I do.

MR. GONZALEZ: Mr. Haywood, the maximum punishment which you could receive on this count is a term of imprisonment [p. 8] of any number of years or life in the custody of the Attorney General.

How old are you, Mr. Haywood?

MR. HAYWOOD: 38, sir.

MR. GONZALEZ: Mr. Haywood, do you understand the charge against you and the maximum punishment that you could receive in addition to what the Judge has explained to you concerning the plea agreement?

MR. HAYWOOD: Yes, sir.

MR. GONZALEZ: Ms. Ortega, have you explained to your client the charges against him and the maximum punishment which he might receive?

MS. ORTEGA: Yes, I have.

MR. GONZALEZ: And do you feel that he understands you?

MS. ORTEGA: He does.

THE COURT: Mr. Haywood, with reference to the nature of the charge, once again to discuss that matter, the charge of course is a charge of murder. It's what technically we would call murder in the second degree under the federal statutes. The indictment alleges an offense that contains these elements:

First, that on or about July 8, 1984 you caused the death of Royletta Bluford by shooting her with a gun.

Second that this was done with malice aforethought, [p. 9] and

Third that it happened within the special territorial jurisdiction of the United States Government, that is, on the military reservation at Fort Bliss, Texas.

Do you understand what you're charged with?

MR. HAYWOOD: Yes, sir.

THE COURT: The maximum punishment, of course, as Mr. Gonzalez explained according to the statute would be any term of years up to life imprisonment. However, the plea agreement provides, and the way I intend to interpret and apply it, it provides that your sentence will not exceed 30 years in the custody of the Attorney General. Do you understand that?

MR. HAYWOOD: Yes, sir.

THE COURT: All right. Mr. Haywood, do you enter your plea of guilty voluntarily?

MR. HAYWOOD: Yes sir; I do.

THE COURT: Has anyone used any force or any threats or anything like that to get you to plead guilty?

MR. HAYWOOD: No, sir.

THE COURT: Other than the plea agreement which I have already discussed and the terms of that, has anybody promised you anything to induce you to plead guilty?

MR. HAYWOOD: No sir.

THE COURT: Do you plead guilty of your own free will?

[p. 10] MR. HAYWOOD: I do, sir.

THE COURT: Mr. Haywood, to make the record clear, do you understand that if you plead guilty you will give up your right to a trial by jury on these charges?

MR. HAYWOOD: Yes sir; I understand.

THE COURT: Do you understand that if you give up that right to a trial, you will be giving up your right to confront and cross examine the witnesses against you in this case?

MR. HAYWOOD: Yes, sir.

THE COURT: Your attorney has issued subpoenaes for several witnesses to testify as Defense witnesses in this case. Are you aware of that?

MR. HAYWOOD: Yes, sir.

THE COURT: You understand that if you plead guilty, those witnesses will not be called upon to testify and you will be giving up your right to call witnesses in the trial.

MR. HAYWOOD: I understand that, sir.

THE COURT: And finally do you understand that if you plead guilty, you would give up the choice that you would have in a trial either to take the witness stand and testify or to remain silent and not give any testimony at all in the trial.

MR. HAYWOOD: Yes sir.

[p. 11] THE COURT: You understand that you're giving up that choice if you plead guilty?

MR. HAYWOOD: Yes, sir.

THE COURT: What about mental competency, Ms. Ortega?

MS. ORTEGA: Your Honor, I believe he's competent to enter a plea.

THE COURT: You actually had some tests run or something, didn't you, or had him checked out?

MS. ORTEGA: Yes, sir.

THE COURT: And the results of that, of course I don't have before me, but did it satisfy you that he is mentally competent to enter the plea?

MS. ORTEGA: Yes, Your Honor, I do.

THE COURT: Mr. Gonzalez, is there anything in the Government's file that would suggest that he's not mentally competent?

MR. GONZALEZ: No, Your Honor. There is evidence that he has consulted the psychiatrist, but we have no evidence to indicate that he's incompetent.

THE COURT: Do you feel, like Ms. Ortega, that he is aware of the situation he's in and aware of the consequences of a plea of guilty?

MR. ORTEGA: Yes, Your Honor, I do.

THE COURT: And that he is able and has been able to cooperate with you in his defense?

[p. 12] MS. ORTEGA: Yes, Your Honor.

THE COURT: He has been?

MS. ORGEGA: [sic] Yes.

THE COURT: Do you agree with that, Mr. Haywood?

MR. HAYWOOD: Yes, sir.

THE COURT: Have you ever had any institutional treatment for any kind of mental problem?

MR. HAYWOOD: No, sir.

THE COURT: Other than what has happened since this case started, have you ever been treated by a psychiatrist?

MR. HAYWOOD: Only once, sir. I was discharged from the military. I had to have a psychiatrist examine me.

THE COURT: When was that, sir?

MR. HAYWOOD: Sir?

THE COURT: When was that, approximately?

MR. HAYWOOD: 1979.

THE COURT: You were examined at that time?

MR. HAYWOOD: Yes, sir.

THE COURT: Was that here in El Paso or somewhere else?

MR. HAYWOOD: At Fort Bliss.

THE COURT: At Fort Bliss. Okay, do you have any reason to believe they found that you were not mentally competent at that time?

MR. HAYWOOD: I was all right, sir.

[p. 13] THE COURT: You were found competent?

MR. HAYWOOD: Yes sir.

THE COURT: All right. To you [sic] knowledge, are you suffering from any kind of mental illness or disorder at this time?

MR. HAYWOOD: No, sir.

THE COURT: I'll find that you are competent. To the charge contained in the indictment, what is your plea, guilty or not guilty?

MR. HAYWOOD: Guilty, sir.

THE COURT: Factual basis.

MR. HAYWOOD: In the event of a trial, Your Honor, the evidence would show that on or about July the 7th, in the late night hours approaching midnight, and going on over into the 8th day of July, 1984, the Defendant went to the Del Norte NCO Club located at Biggs Army Airfield which is on Fort Bliss, Texas.

This particular location of course is in the Western District of Texas, and it is on lands that were acquired for the exclusive use of the United States, under the exclusive jurisdiction thereof.

The Defendant at that time, when he went to the club, went with a pistol, a .22 caliber pistol, went inside the club, approached the deceased in this case, Royletta Bluford, and with malice aforethought, did murder Ms. Bluford [p. 14] by shooting her repeatedly with the .22 caliber pistol.

The results of the autopsy showing that in fact the cause of death of Ms. Bluford was the shots fired by this Defendant.

THE COURT: Mr. Haywood, you have heard the statement just made. Do you disagree with it in any respect?

MR. HAYWOOD: No, sir.

THE COURT: Do you admit that that's what happened?

MR. HAYWOOD: Yes, sir.

THE COURT: All right, based on that I'll find a factual basis for your plea of guilty and accept your plea to the indictment in this case.

At this time I'll defer sentencing and request a presentence investigation. Is that going to be your assignment, Mr. Smith?

MR. SMITH: Your Honor, Mr. Fry will handle this case. He would ask for three weeks.

THE COURT: Well, let me just check the calendar first. Ms. Ortega, maybe I should ask you about any conflict that you have that you know of around the first part of November.

MS. ORTEGA: Your Honor, November the 6th, I believe, I have to be in Pecos for docket call.

THE COURT: You're having a docket call in Pecos on election day?

MS. ORTEGA: No, the 5th. Excuse me. The day [p. 15] before.

THE COURT: Monday the 5th. All right. And you expect to be back by the 6th or will you be down there doing a trial?

MS. ORTEGA: I don't know. I may be down there.

THE COURT: It's possible. All right. We'll set it for the week following that, on the 14th of November at 8:30 a.m. will be the date set for sentencing. In the mean time a presentence report will be prepared, and of course you'll have access to that and a chance to discuss it with your client.

Anything further from the Government at this time?

MR. GONZALEZ: No, Your Honor.

THE COURT: From the Defendant?

MS. ORTEGA: No, Your Honor.

THE COURT: Well, the previous setting of this case for trial on Monday then will be vacated as unnecessary and we'll try something else.

The Court'll recess.

* * *

November 14, 1984 at 8:30 a.m.

The Sentencing.

MR. GREENBERG: Mark Greenberg appears for the United States. We're ready for sentencing, Your Honor.

[p. 16] MS. ORTEGA: Evelina Ortega for Mr. Haywood. We are ready. Your Honor, I know this isn't standard procedure, but there are five people that are present in the courtroom who voluntarily came over here, and they would like to provide some testimony to talk to the Court. Could we call them? They should be brief.

THE COURT: If I had know [sic] this was going to happen, of course, we would have set this for a time when I had more than 30 minutes, but we have a trial scheduled and a jury coming in, and I don't have time for that. No.

MS. ORTEGA: Okay, Your Honor. Could we call just a couple of them?

THE COURT: To do what, now?

MS. ORTEGA: They know Mr. –

THE COURT: Take the witness stand and testify, you mean?

MS. ORTEGA: Yes, Your Honor, or maybe just come up to the microphone and address the court.

THE COURT: No, ma'am, I won't permit that. I have a presentence report. Anything that you wanted in

there should have been put in the presentence report, or they should have written letters. You know how that's handled.

MS. ORTEGA: Thank you, Your Honor. We are ready to proceed, Your Honor.

THE COURT: Do you have any corrections that you [p. 17] want to make to the presentence report?

MS. ORTEGA: Your Honor, I believe a couple of the corrections I have talked to Mr. Fry about and he has taken care of that. I think on page 5 on the prior record, the first arrest was back in 1963 or '64. On page 8, my client claims no knowledge of the incident that occurred on March 29, 1983.

The only other thing would be under the Victim's Impact Statement, and this is something that I'm bringing up, my understanding of Title 18, U. S. Code, Section 3579, the order of restitution would only include funeral and related services.

THE COURT: I think I agree with you.

MS. ORTEGA: That would be all.

THE COURT: All right, would you like to make a statement then on behalf of Mr. Haywood?

MS. ORTEGA: Yes sir. First of all, I'd like to start off by saying that my statements are not meant to justify my client's actions. And I don't believe that he would want me to justify what happened, but I think there are facts that are important, and I think that the Court should be aware of them.

He had been dating Royletta for about six months before the incident happened. He became deeply involved with her. He fell in love with her. He devoted all of his [p 18] free time with her when he wasn't attending school or working. There [sic] relationship became so close that they exchanged apartment keys. And they really didn't have any trouble until June when, and I think it might be a little bit confusing in the Defendant's version as to what happened, some of Royletta's old friends started coming around and she started breaking some dates with Mr. Haywood, and they startted [sic] having their first disagreement about that because he had stopped dating other women and he was totally committed to her, a lot more serious about her than I suspect that she was about him.

They had a disagreement in June, and she went over and stayed over with a friend of hers, an old boy friend of her's for several days. And when they got back together again, there was some heated words that were exchanged. Some of them dealt with what was said in a complaint that she filed. But they talked again. And it was understood by my client that there was nothing going on between Royletta and the friend, and everything seemed to be worked out.

They had gone out to dinner on July 3rd. They were celebrating the fact that my client had just gotten his Associates Degree from the Community College. And again they had a long time to talk. And Mr. Haywood thought that they had worked everything out. Royletta had told him that she was going to give him a second chance. And he was supposed to call her on Thursday,

July 4th. She had planned [p. 19] to spend the 4th of July at a picnic with her family.

He proceeded to call her on Thursday and Ms. Bluford wouldn't talk to him. She didn't want to have anything to do with him. And she moved in with a friend of hers named Pat Aguilar. He couldn't handle it. He started drinking heavily. He had drank before but he had stopped drinking when he started dating Ms. Bluford. And he found himself extremely depressed. He had made plans to move to Denton, Texas the following Tuesday. He had a friend, Robert Atkins, who is present in the courtroom come over on Satursday [sic] morning. He had packed his clothes in boxes and he was leaving them with Mr. Atkins to take care of them for him until he returned to El Paso or something else could be done with them.

He didn't want to leave El Paso or part ways with her in disagreement. And he wanted to get together with her again so they could continue to see each other. He had asked her to join him in Denton. On Tuesday night he had even proposed or suggested marriage to her. And he was extremely surprised when Ms. Bluford wouldn't even respond to his calls.

On Saturday morning he went and purchased a gun. He purchased a gun, he tells me, because he was thinking about killing himself. He had been drinking heavily. He had had very little to eat for the last few days. And being drunk, he made some phone calls. He called a few of his [p. 20] relatives and talked to an old friend. He didn't talk to them, thinking about killing himself, but he did talk to them and it made him feel better about himself. And he decided that he was going to sell the gun. He thought

that wasn't the thing that he wanted to be doing. So on Saturday he started attempting to sell the gun to some other – some of his friends, cab drivers. One of the cab drivers is present in the courtroom. That's Mr. Diaz who's seated right on the first bench.

He talked to Mr. Diaz about selling the gun. There was some – there wasn't any agreement on the price. And so on Sunday, the following day, he again spoke to Mr. Diaz in the early evening. He was carrying the gun around for that reason, because he was trying to sell it. And Mr. Diaz was prepared to come up here and tell the Court that he was trying to sell the gun to him. And he was even attempting to sell it to him on Sunday evening.

Since he was on call that evening, a couple of his calls lead [sic] him over to Biggs Field to the NCO Club. At the club, outside the club he noticed Pat Aguilar's car parked out there. And he thought he would go in there and try to talk to Pat and see whether he could resolve the problem that he was having with Royletta.

When he went into the club, he saw that Royletta was there with Pat. As several of the witnesses' statements [p. 21] taken from the FBI, my client went over there and tried to talk to Royletta many times and she was ignoring him. He even offered, through a waitress, to buy her a drink and she refused. He started talking to a friend of Royletta's at the bar. He started drinking again heavily. Most of what I said can be confirmed in a statement taken by the FBI, given by Royletta's friend.

He didn't go in there with the thought in mind of killing Ms. Bluford. He had too much to drink. He was depressed. He had the intention of parting with her in

good form and moving on to Denton. He just kind of lost control of himself when this happened.

After the shooting took place, he was outside and some of the witnesses I've talked to told me this, that he was going to shoot himself again, and there was a Sergeant there present at the club who talked him out of it. He, unlike the Prosecution report, the gun was put down. It wasn't dropped or taken away by force.

There was a medic who was present, Melvin Sledge, and he told Mr.Haywood [sic] that Royletta was still alive. And so he put the gun down.

Beside this statement, some of the statements included in the presentence report, a lot of the witnesses that I talked to, and also statements taken from the FBI, he was screaming and he was also asking that somebody kill [p. 22] him. He made several statements that he wanted to die as well, and that he was fighting off many medical treatment at the beginning.

I think that this case, in my view, is more akin to a case of voluntary manslaughter. My client, however, did want to plead to the murder charge. I think that he from the beginning wanted to – I don't think there ever been an instance where he hasn't wanted to take responsibility for what he did.

Since he's been incarcerated, he has attempted suicide two times. One of them, he came very close to succeeding.

The only request that we would have with regard to sentencing would be that the Court consider sentencing him under 4205(b)(2). We don't have any request for a

specific designation as to the place of incarceration. That would be all we would have, Your Honor.

THE COURT: Thank you, Ms. Ortega. Mr. Haywood, would you like to make a statement to the Court?

MR. HAYWOOD: Yes, sir.

THE COURT: Go ahead.

MR. HAYWOOD: I love Roy. She was a sweet and kind person. I'm just sorry for what I did. I hurt a lot of people. I hope her family and her friends and my family will forgive me for what I did. And to the friends [p. 23] that I thought I didn't have, I have them here now. I just hope that somewhere along the line the Good Lord will forgive me and I can make a better life somewhere in the near future. That's all, Your Honor.

THE COURT: All right, Mr. Haywood, I've studied the presentence report, of course, in its entirety. There are a lot of things in here that indicate the fact that excessive drinking was probably a factor, not only in this particular incident, but in some other transactions that are shown here in the record.

The record also indicates that you've had difficulty for some years with all kinds of personal relationships and perhaps drinking was the main factor in that. Perhaps there were other factors that went along with it. But you and your attorney have brought out that you thought excessive drinking was a contributing factor in this particular case as well as the other matters that have been discussed.

That's not an excuse, of course. It's not really a defense for what you did, but it is a factor that I'll take into consideration.

The sentence is 30 years in the custody of the Attorney General. Based on your request and your lawyer's request, I will make Section 4205(b)(2) applicable to that sentence. And with respect to the Victim & Witness Protection Act of 1982 and the requirement of restitution, I agree with [p. 24] your attorney's comment that it's limited to hospital and funeral expenses that were incurred by the victim or the family of the victim.

And as I compute it, that is the amount of $3,216.38. So that will also be included in the judgment that restitution be made in that amount, $3,216.38.

Anything from the Government in this case?

MR. GREENBERG: No, YourHonor. [sic]

MS. ORTEGA: Your Honor, the only other request on the restitution is that it be made after he has served his incarceration.

THE COURT: Well, as a practical matter, I don't know of any other way that it could be handled. But –

MS. ORTEGA: I'm not sure, if it doesn't specify whether it be handled any other way.

THE COURT: If that's your request, I will state it in those words, after release from custody. Anything else from the Defense?

MS. ORTEGA: No, Your Honor.

THE COURT: Well, good luck to you, Mr. Haywood.

MR. HAYWOOD: Thank you, Your Honor.

* * *

[p. 25] COURT REPORTER'S CERTIFICATE

I, Ernest C. Swanson, Official Court Reporter in and for the Western District of Texas, El Paso Division, do hereby certify that I reported the above styled matter in shorthand, and that I later reduced my shorthand notes to typewritten form, and that the above and foregoing is a true, correct and complete transcript of the proceedings offered in the case.

Signed by me this the 20th day of February 1988.

/s/ Ernest C. Swanson
Ernest C. Swanson
Official Court Reporter.